IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

ASHOOR RASHO, *et al.*,

Plaintiffs,

vs.

DONALD SNYDER, *et al.*,

Defendants. **No. 00-CV-0528-DRH**

MEMORANDUM AND ORDER

Herndon, District Judge:

I. Introduction

Plaintiffs, prisoners at Tamms Correctional Center, filed suit alleging that the conditions of their confinement violate their rights under the Eighth and Fourteenth Amendments to the United States Constitution and two federal statutes, the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131 *et seq*., and the Rehabilitation Act, 29 U.S.C. §701 *et seq*. Plaintiffs seek to maintain this case on a class basis, with the class consisting of "all prisoners who are now, have been before, or will be hereafter incarcerated at Tamms who have serious mental illnesses, defined as a substantial disorder of thought or mood which significantly impairs the judgment, behavior, and capacity to recognize reality or cope with the ordinary demands of life within the prison environment and is manifested by substantial pain or disability." (Complaint, ¶ 7). The Court denied the Plaintiffs' motion for class certification after determining that Plaintiffs failed to meet their burden of showing

that the purported class met the numerosity requirement of **FEDERAL RULE OF CIVIL PROCEDURE 23(a)(1)**. Before the Court today is the Plaintiffs' motion to reconsider the denial of class certification. (Doc. 95). The Court conducted a hearing at Tamms Correctional Center, toured the prison, and spent several hours reviewing *in camera* the mental health files of all prisoners the Plaintiffs' counsel recommended it review. For the reasons explained below, the Court **DENIES** the Plaintiffs' motion to reconsider. (Doc. 95).

II. Background

Since the Plaintiffs first moved for class certification, there has been some controversy among the parties as to how to define the class most precisely. For the sake of clarity, the Court will provide a brief history of this controversy.

In March, 2001, shortly after the Defendants filed ultimately unsuccessful motions to dismiss the complaint, the Plaintiffs moved to certify the class. In their reply brief in support of that motion, Plaintiffs suggested that the Court adopt what they termed the "records definition" of the proposed class, based on an Illinois Department of Corrections Directive No. 05.12.110, "Placements at a Closed Maximum Security Facility" ("the Directive") (Plaintiff's Hearing Exhibit 1). Section G.3 of the Directive provides that a "mental health professional" shall review each inmate's medical and master record files prior to his placement at Tamms to identify whether he has certain listed mental health symptoms. The Directive then sets forth ten criteria according to which each inmate must be evaluated to determine

his fitness for placement at Tamms.

Plaintiffs' proposed "records definition" modified some of the factors listed in the Directive. (Plaintiff's Hearing Exhibit 2). Plaintiffs argued that their proposed modifications to the Directive would make the process of determining who would qualify as members of the proposed class an objective inquiry.

On November 6, 2001, Magistrate Judge Proud issued a Report and Recommendation ("Report") that the motion be denied. (Doc. 64). Part of the Report recommended that the Court deny the motion because Plaintiffs failed to carry their burden of demonstrating that the proposed class would be sufficiently numerous. On January 25, 2002, Plaintiffs filed their objections to the Report. This Court did not initially adopt or reject the Report, but ordered the Defendants to file under seal additional information – the number of Tamms inmates whose records indicate they meet the Plaintiffs' proposed class definition. (Doc. 75). The Plaintiffs objected to this procedure, arguing that they should be permitted to examine the same records that the Defendants reviewed for the required submission. The Court rejected that proposal out of concern for the confidentiality of the prisoners' medical records. (Doc. 80).

When the Defendants submitted a sworn, verified statement that the number of potential class members amounted to only fifteen inmates, the Court denied the Plaintiffs' motion for lack of numerosity. (Doc. 85). Plaintiffs filed this motion to reconsider that decision. (Doc. 95). In support of the motion, they submitted additional factual information suggesting that the number of potential

class members was much higher than the fifteen inmates Defendants reported. The information included statements purportedly by Tamms staff members indicating that approximately thirty-five inmates were on the psychiatric and psychological "chronic caseloads." Plaintiffs argued that all inmates on these "chronic caseloads" should have been listed in Defendants' *in camera* disclosure, and concluded that the class must include at least fifty inmates presently at Tamms.

The Court set Plaintiffs' motion to reconsider for hearing and ordered the Defendants to produce "the complete mental health records for all prisoners incarcerated at Tamms" for the Court's review. (Doc. 107). The parties then jointly moved to continue the hearing and hold it at the courtroom at Tamms Correctional Center. Per **42 U.S.C. § 1997e(f)(2)**, the Court granted that motion and set the hearing for October 1, 2002, at Tamms.

At the Tamms hearing, the Court heard oral argument on an issue Plaintiffs raised in their moving papers – whether Defendants fully complied with the Court's order to disclose the number of inmates who met the criteria. In response, the Defendants presented testimony from Dr. Kelly Rhodes, a licensed clinical psychologist and the Supervising Clinical Psychologist at Tamms since it opened in 1998. (Hearing Transcript at 17) ("Tr."). Dr. Rhodes testified that she prepared the submission stating that only 15 inmates met the class definition. (Tr. at 17-18, 26). She stated that she understood that the class definition was the Directive (Plaintiff's Hearing Exhibit 1), without Plaintiffs' proposed modifications to it (Plaintiffs' Hearing Exhibit 2). (Tr. at 21, 25, 35).

Dr. Rhodes addressed Plaintiffs' claim that the approximately 35 inmates on the "chronic caseload" should have been counted as potential class members. Dr. Rhodes stated that her mental health staff sees each inmate at least once a month, and that the "chronic caseload" consists of all inmates seen for a number of reasons on a more frequent basis. (Tr. at 18-19). Thus, the "chronic caseload" includes inmates who do not suffer from a "serious mental illness," but who might require more sustained attention from the mental health staff for reasons other than a mental illness. (Tr. at 18-19). Some of the reasons why such extra attention could be appropriate include the inmate's imminent transition to a less secure facility, lack of social support in the community, or participation in an anger management program. (Tr. at 19).

Dr. Rhodes also compared the Directive (Plaintiffs' Hearing Exhibit 1) to the modified criteria Plaintiffs suggested (Plaintiffs' Hearing Exhibit 2). Dr. Rhodes explained that the Plaintiffs' modifications do not provide a more objective basis for evaluating who should be included in the class of seriously mentally ill inmates. (Tr. at 21, 22). Dr. Rhodes pointed out that Plaintiffs' proposed modifications would include any inmate placed on "suicide watch status." (Tr. 21-22) (Plaintiffs' Hearing Exhibit 2, ¶ c). However, placement on suicide watch status requires only a statement by an inmate that he feels suicidal. (Tr. at 22, 31). No clinical judgment or behavioral issue informs the decision to place an inmate on suicide watch. (Tr. at 22, 31). Dr. Rhodes stated that many inmates seek placement on suicide watch status for reasons that have nothing to do with whether they

actually intend to end their lives, but because they want a change of scene, or to speak with the duty warden, or to talk with friends who are also on suicide watch. (Tr. at 22, 37-38). Similarly, Dr. Rhodes pointed out that the Plaintiffs' proposed modification would include any inmate who had received antipsychotic psychotropic medication. (Tr. at 23). This factor is also a poor objective indicator of whether an inmate has a serious mental illness, because such medications are often prescribed in an attempt to slow the patient's reaction time to help with anger management and other issues. (Tr. at 23). Thus, drugs of this kind are sometimes prescribed at Tamms to address behavioral issues, not serious mental illnesses. (Tr. at 23).

Dr. Rhodes stated that the list of fifteen inmates she prepared contains all the inmates who meet the criteria set forth in the Directive, Plaintiff's Hearing Exhibit 1. (Tr. at 18). However, she pointed out that these fifteen do not all have serious mental illnesses according to recognized mental health standards. Dr. Rhodes testified that only six of the inmates currently at Tamms suffer from "serious mental illness" according to such recognized standards. (Tr. at 20-21).

At the conclusion of Dr. Rhodes' testimony, the undersigned District Judge inquired of Plaintiff's counsel which of the over two hundred Tamms inmates' mental health records she wished the Court to review. (Tr. at 47-52). Plaintiff's counsel responded by submitting Plaintiffs' Hearing Exhibit 3. (Tr. at 52). This document, titled "Names – Possible Plaintiffs," is a list of inmates Plaintiffs' counsel represented as containing those persons whose mental health records would be most likely to include potential class members. (Tr. at 52-53). Plaintiffs' counsel also

submitted as Plaintiffs' Hearing Exhibit 4 approximately fifty questionnaires that some Tamms inmates returned to her. (Tr. at 52-53). These inmates who returned these questionnaires comprise a subset of the inmates whose names are listed on Plaintiffs' Hearing Exhibit 3.

The District Judge then toured the facilities at Tamms along with counsel for both parties. This comprehensive tour allowed the District Judge to personally examine the living areas and mental health treatment facilities on site, including the suicide watch ward. This area contains cells in a separate section of the prison, where inmates are close to mental health staff. The suicide watch area offers a little more social contact than the regular housing sections, and, arguably, the conditions of confinement there are slightly less restrictive. Finally, the Court spent several hours reviewing *in camera* the mental health records of those inmates listed in Plaintiffs' Exhibits 3 and 4, including all those inmates currently on the "chronic caseload."

III. Analysis

Plaintiffs seek reconsideration of the Court's order denying class certification for failure to demonstrate that the proposed class is sufficiently numerous to meet the requirements of **FEDERAL RULE OF CIVIL PROCEDURE 23(a)(1)**. Strictly speaking, a motion to reconsider does not exist under the Federal Rules of Civil Procedure. Nevertheless, such motions are routinely presented, and the Court will consider them if timely filed. If filed within ten days of the entry of the judgment or order in the case, the motions are construed as motions to alter or amend under

Federal Rule of Civil Procedure 59(e). ***See, Britton v. Swift Transportation Co., Inc.,* 127 F.3d 616, 618 (7th Cir. 1997)("the key factor in determining whether a 'substantive' motion is cognizable under Rule 59 or 60 is its timing").** If thereafter, then the Motion is construed as one filed per Rule 60(b). ***U.S. v. Deutsch,* 981 F.2d 299, 300-01 (7th Cir. 1992)**. The Plaintiffs filed their motion to reconsider more than a month after the Court denied their motion for class certification. Therefore, the motion to reconsider must be evaluated under Rule 60(b).

> **FEDERAL RULE OF CIVIL PROCEDURE 60(b)** provides, in relevant part,
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> "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for . . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)."

FED. R. CIV. P. 60(b). Plaintiffs provided some newly discovered evidence, consisting of statements attributed to Dr. Rhodes, Donald Snyder, the Director of Tamms, and other unnamed Tamms staffers. These various statements suggested that the number of potential class members exceeded the fifteen reported by the Defendants. Plaintiffs' new evidence was sufficient to convince the Court that a second look, including close examination of relevant mental health records, was in order.

This second look proved extraordinarily worthwhile. The hearing, facility tour, and on-site *in camera* inspection of inmate records suggested by

Plaintiffs' counsel[1] provided an opportunity to consider evidence unavailable to the Magistrate Judge and the District Judge thus far. Touring the facility in particular allowed the Court to see first-hand the circumstances in which the potential class members live, which in turn provided invaluable background and context to the Court's review of the records.

Taken together, the hearing, facility tour, and review of the inmate records convinced the Court that Plaintiffs' proposed class definition is overly broad. The Court believes that using this definition (Plaintiffs' Hearing Exhibit 2) would not provide greater objectivity in determining who belongs in the class, but might produce the opposite result instead. Indeed, Plaintiffs' proposed records definition would include those inmates who regularly manipulate the psychiatric staff to achieve some minor change in their status or conditions of confinement.

The "suicide watch" at Tamms illustrates this danger. Plaintiffs' proposed definition would include among the class all inmates who "have been placed on 'suicide watch status' . . . more than twice or more than seven days for one episode." (Exhibit 2, ¶ c). However, Dr. Rhodes testified that she places on suicide watch any inmate who states that he wants to be on suicide watch or that he feels suicidal. (Tr. at 22, 31). She does so out of a sense of caution (Tr. at 35-36), recognizing that an inmate who makes such statements does not necessarily have the actual intent to cause his own death. (Tr. at 36-37). He may have other motives,

[1]That is, those inmates on Plaintiffs' Hearing Exhibits 3 and 4, which include every inmate on the "chronic caseload."

such as temporary residence in the somewhat less restrictive environment of the mental health treatment ward where conversation with fellow inmates may be possible. (Tr. at 22, 37-38). Similar criteria govern placement on the "chronic caseload," whose members may include prisoners with serious mental illnesses among those needing anger management training or who simply crave extra attention. (Tr. at 18-20).

The Court's *in camera* review of the records substantiates Dr. Rhodes' highly credible testimony. Time and again, the records demonstrated that inmates on suicide watch or the "chronic caseload" had ulterior motives rather than a serious mental illness. One of the inmates listed on both Exhibits 3 and 4 stated that his mental health complaint was denial of access to television. Another claimed that he was suicidal because the mental health staff sent a man to treat him instead of a woman. A third was angry because he did not get the new shoes he wanted, and a fourth because his prison jump-suit was too large. In a startling confirmation of Dr. Rhodes' testimony, one inmate on suicide watch frankly conceded that he wanted that status so he could talk with a friend. This short list merely illustrates the Court's findings. It is by no means exhaustive; similar examples abound.

The Questionnaires Plaintiffs submitted as Plaintiffs' Hearing Exhibit 4 further strengthens the Court's conclusion, and illustrates the peril of making the inmates masters of whether they join the class. For example, many of the inmates who returned the questionnaires answered "yes" when asked whether they received psychotropic drugs while at Tamms. However, the questionnaire did not ask, and

the prisoners did not answer, whether these drugs were administered to treat a serious mental illness or as part of a behavior modification plan. In any event, the Court believes that the prisoners may not be the most reliable authorities on the subject of psychotropic medication. Many of the prisoners who answered the psychotropic question in the affirmative stated that they had been drugged with "benadryl." The Court recognizes this drug as an over-the-counter antihistamine.

All the evidence, taken together and in context, convinced the Court that the Plaintiffs' proposed class definition, Plaintiffs' Hearing Exhibit 2, is much broader than necessary. It would include as class members inmates for whom there is no recorded evidence of serious mental illness. Further, the Plaintiffs' proposed class definition would make the process of determining who belongs in the class more subjective, not less. An inmate who sees the mental health staff more than once a month[2] or who says he is suicidal because he wants a temporary housing change would be included among those with serious mental illnesses. This would put inclusion in the proposed class at the discretion of the inmates themselves, who may occasionally succumb to the temptation of manipulating Tamms' mental health system in service of ulterior motives – to put it mildly.

Now that the Court has had the opportunity to receive the testimony of Dr. Rhodes, testimony which the Court found to be credible and which was

[2] A visit from mental health more than once a month for any reason at all is sufficient for placement on the "chronic caseload." (Tr. 18-19). Thus, being on the "chronic caseload" is not objective evidence of serious mental illness.

substantiated by the records, it is abundantly clear that the definition of the class should be "seriously mentally ill" as that phrase is more fully defined and clarified in the Directive, Plaintiffs' Hearing Exhibit 1. Moreover, the Court accepts as credible Dr. Rhodes' testimony that only fifteen current inmates meet the criteria set forth in the Directive. Based on the evidence submitted by Plaintiffs, the testimony presented at the hearing, the tour of the prison, and its own *in camera* review of the inmates' records, the Court believes that the Defendants did not understate the number of potential class members. The Court therefore **FINDS** that the number of potential class members is too small to render "joinder of all members impracticable." **FED. R. CIV. P. 23(a)(1).** Plaintiffs motion to reconsider is therefore **DENIED.** (Doc. 95).

This finding raises another issue. Dr. Rhodes testified that the number of inmates meeting the Directive's criteria is fifteen, yet stated that only six inmates are "seriously mentally ill" according to accepted medical criteria. (Tr. 20-21). Since Plaintiffs seek to represent a class consisting of Tamms inmates who suffer from "serious mental illnesses" (Complaint ¶ 7), the discrepancy raises the possibility that even the Directive's definition is excessively broad. However, the Court need not resolve this dispute at present. The only issue now before the Court is whether the new evidence presented is sufficient to grant the Plaintiffs' motion to reconsider the denial of class certification for lack of numerosity. The Court's finding that Dr. Rhodes' testimony is credible and supported by the additional evidence it reviewed provides no basis for reconsideration of that order, and thus no need to determine

whether the Directive's definition is also overly broad.

Finally, ten days after the hearing and the Court's review of the records, the Plaintiffs' attorney submitted a document she titled "Plaintiffs' Post-Hearing Submission Regarding Class Certification." (Doc. 119). The Defendants objected to this submission and moved that it be stricken. (Doc. 121). Plaintiffs' submission consists largely of additional argument from the facts produced at the hearing. Such additional argument is unnecessary, since the Plaintiffs' counsel had ample opportunity to present an oral argument at the hearing. In addition, the Court came to its findings and conclusions on the motion based on its careful examination of the evidence before it, as well as Plaintiffs' counsel's oral argument. There is no need to strike the Plaintiffs' post-hearing submission, so that portion of the Defendants' objections consisting of a motion to strike is **DENIED**. (Doc. 121).

IV. Conclusion

The Court **DENIES** the Plaintiffs' motion to reconsider its order denying class certification. (Doc. 95). The Court also **DENIES** the Defendants' motion to strike the Plaintiffs' post-hearing submission. (Doc. 121).

IT IS SO ORDERED.

Signed this 28th day of February, 2003.

/s/ David R. Herndon
DAVID R. HERNDON
United States District Judge